To: Bert Robinson
Chair, Public Records Subcommittee

From: Edward P. Davis, Jr.
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Re: Access to Investigatory Records

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As noted by several Task Force members at last Thursday's meeting, providing access to police investigatory records has both positives and negatives. Navigating a course between the benefits and risks of increased visibility into law enforcement activities is not easy. However, it is possible.

There exist legitimate law enforcement concerns—articulated both by the San Jose Police Department and the District Attorney's office—that unbridled access would jeopardize. Moreover, several advocacy groups such as those representing victims of sexual assaults forcefully brought home the fact that access to certain records would have two equally adverse consequences: discouraging victims from reporting assaults and making public facts that further traumatize those victims.

Conversely, the public testimony also made a case that access to investigative records would provide important insight into the workings of the SJPD. Citizens, for example, were unable to get information about cases in which they were potential victims and about which questions of police misconduct were raised.

I do not believe the competing interests of law enforcement, victims and the public can be resolved through laundry lists of what should or should not be available to the public and under what circumstances. Investigative files will contain a wide variety of information that defies easy categorization: witness statements; medical reports; forensic reports of all types; requests for assistance; chain of custody documents, rap sheets—the list is dependent only on the variety of cases being investigated, which is to say that the list is almost infinitely variable.

Similarly, using standards such as "closed" cases or the "likelihood of prosecution" are not helpful to define what records should be accessible. Too expansive a definition may interfere with law enforcement's ability to revive dormant cases or investigate related cases. And the fact a case is closed or prosecution unlikely does not alleviate legitimate privacy concerns of victims and witnesses.

Moreover, the definition of investigatory records should not be predicated on what happens in the judicial system. As I pointed out at Thursday's meeting, most criminal cases do not go to trial, and even in those that do, not all investigatory records will be court records. Although conditioning the **timing** of access on judicial proceedings may

be appropriate (*e.g.*, at the end of a prosecution), using the court system to determine **what** should be accessible is not a good idea.

Thus, if some access to investigative records is a worthwhile objective—and there appears to be widespread agreement that some access would be beneficial—it must be tempered by fairly broad exceptions applied on a case-by-case basis. In other words, considerable discretion must be exercised by law enforcement to protect interests that are clearly furthered by non-disclosure.

Four interests have been articulated by law enforcement and members of the public: protecting (1) ongoing investigations or prosecution; (2) the safety of those involved in the investigation; (3) legitimate and confidential law enforcement techniques; and (4) privacy interests.

The first two of these interests are already addressed by the Subcommittee's draft. The third will be incorporated by the Subcommittee in its new draft. Bob Brownstein's limitations that pertain to sex offenses address a part of the privacy concern. I offer for the Subcommittee's consideration a proposal that would incorporate into Section 5.1.1.020 a fourth exception to the general rule in favor of access to investigatory records: when necessary to protect legitimate privacy interests.

The California Public Records Act has language that is useful to formulate a standard for access to investigatory records. Personnel or medical records are exempt from disclosure if access "would constitute an **unwarranted invasion of personal privacy**." Cal. Gov't Code Section 6254(c)(emphasis added). Although this standard can be very subjective, it provides a basis upon which the Subcommittee can address the concerns expressed by a number of groups that public access to victim and witness information would discourage reporting and exacerbate trauma.

This standard can be combined with language from the Public Records Act with which the SJPD has already expressed a high degree of comfort—where the public interest in nondisclosure clearly outweighs the public interest in disclosure. Gov't Code Section 6255. *See* SJPD Input to Subcommittee Recommendations, September 10, 2007, at page 6.

Thus, the exemptions would look something like this:

"If a report or investigatory record is not exempt, information may be redacted if necessary to protect: (1) the safety of a person involved in the investigation; (2) the successful completion of the investigation or a related investigation; (3) legitimate law enforcement techniques that require confidentiality in order to be effective; or (4) against an unwarranted invasion of personal privacy where the privacy interest clearly outweighs the public interest in disclosure."

To help ensure that the "unwarranted invasion of personal privacy" exception is not used to defeat the benefits of access discussed above, I suggest that something along the lines of the following qualifications be considered:

"Investigatory records may not be withheld under the privacy exception if: (1) those records pertain to the person making the request, whether as a victim, uncharged suspect or witness; or (2) for the purpose of preventing the disclosure of any law enforcement practice, procedure or conduct not otherwise exempted under this ordinance."

Note that this clarification of what constitutes an unwarranted invasion of privacy is limited just to that exemption. It is not designed to apply to the other exemptions. Thus, for example, the SJPD can still withhold information about a law enforcement practice if disclosure would jeopardize a legitimate and confidential law enforcement technique. It simply could not do so by categorizing the technique as an invasion of privacy. However, in a situation where allegations of excessive force are at issue, neither exemption could be employed because the use of excessive force is neither a legitimate confidential law enforcement technique nor would identification of the officer(s) involved be an unwarranted invasion of personal privacy.

The exemptions to the general rule of access to investigatory reports give the SJPD a great deal of discretion. However, given the legitimate concerns of law enforcement and the public, I believe such deference is necessary. The public must depend to a great extent on the SJPD implementing its obligations in good faith. However, I would suggest consideration of two measures that might assist in evaluating how well this proposal is working:

- First, if a request is denied by SJPD, it must specify in writing which exemption justifies the denial.

- Second, implementation of this part of the Sunshine Ordinance should be subject to review. The body established to address Sunshine issues can evaluate how many times the SJPD used each exemption and, if necessary, confidentially review the underlying records to see if those exemptions are being used in good faith. Conversely, if access creates an undue burden of law enforcement—even with the exemptions—this portion of the Sunshine Ordinance can be modified or eliminated.

I offer the above in concept only. My suggestions need to be critiqued and examined by those on each side of the access issue.